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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 **MICHELLE MAZUR, On Behalf of**
17 **Herself and all Others Similarly**
18 **Situated,**

18 Plaintiff,

19 v.

20 **EBAY, INC., HOT JEWELRY**
21 **AUCTIONS.COM d/b/a JEWELRY**
22 **OVERSTOCK AUCTIONS.COM d/b/a**
23 **PARAMOUNT AUCTIONS, and DOES**
24 **1-100, inclusive**

23 Defendants.

Case No. C 07 3967 MHP

MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFF'S
MOTION TO STRIKE
EXHIBIT A OF
DECLARATION OF
STEPHEN A. WALTERS

28 ///

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1 Plaintiff Michele Mazur ("Plaintiff"), by her attorneys, Matthew A. Siroka and Balestriere
2 PLLC, respectfully submits this Memorandum of Law in support of Plaintiff's Motion to Strike
3 Exhibit A of Defendant HJA's Declaration of Stephen A. Walters ("Walters Exhibit A").

4 **PRELIMINARY STATEMENT**

5 Defendant Hot Jewelry Auctions.com ("Defendant" or "HJA") has improperly tried to
6 pass off a version of its Terms and Conditions (the "Agreement"), which is substantially different
7 than the version actually presented to Plaintiff and all other members of the Class ("Class
8 Members"). While the text is the same, the formatting differs substantially. Moreover, Class
9 Members could not have read the text without great difficulty given the minimal view of the
10 Agreement that Class Members are able to see on their computer screens. Walters Exhibit A
11 masks the fact that the version presented to the consumer is so condensed that it is difficult for a
12 consumer to actually read the terms of the Agreement.

13 **STATEMENT OF FACTS**

14 For a complete rendition of the facts alleged, Plaintiff respectfully refers the Court to the
15 Complaint.

16 **ARGUMENT**

17 **I. THE VERSION OF THE AGREEMENT PRESENTED BY HJA IN ITS EXHIBIT** 18 **DIFFERS SUBSTANTIALLY FROM THE VERSION PRESENTED TO ITS** 19 **CUSTOMERS**

20 Walters Exhibit A should be stricken from the record. Under the California Code of Civil
21 Procedure, a Court has the right to strike out any "irrelevant, false, or improper matter asserted
22 during the pleading stages." Cal. Civ. Proc. Code § 436. The Court is able to rely on judicial
23 notice as a means of doing this. Cal. Civ. Proc. Code § 437. If a fact is "not subject to reasonable
24 dispute" then a court may take judicial notice of it. Fed. R. Evid. 201(B). As shown below, there
25 can be no reasonable dispute that Walters Exhibit A differs drastically from the Agreement
26 Plaintiff actually saw, and, thus, Walters Exhibit A should be stricken from the record.

27 Walters Exhibit A is an inauthentic representation of what Plaintiff and Class Members
28 agreed to when doing business with HJA. Walters Exhibit A features eleven pages of well-

1 spaced, well-formatted text taken from HJA's website. In truth, however, no customer of HJA
 2 has *any reason* to go to this website, as all transactions are conducted through eBay's website.
 3 On eBay's website, the Agreement is presented at the bottom of the screen in a small box limited
 4 to approximately thirteen lines of text, which the user must scroll through to view. *See* Agreement
 5 as Displayed on eBay's Website ("Exhibit A"). Especially egregious, as can readily be seen
 6 through a comparison with eBay's terms at the top of the screen, is how HJA presents its
 7 Agreement on the eBay website *completely devoid of all formatting*. When printed out, the
 8 Agreement takes up not eleven pages, but merely four, and exists as one solid block of text which
 9 is extremely hard to read and is clearly intended to confuse. This difference in formatting
 10 between the version of the Agreement presented by HJA and that which was agreed to by
 11 Plaintiff and members of the Class is highly significant as it is a further gloss of HJA's
 12 unconscionable behavior.

13 Thus, Walters Exhibit A is materially inauthentic and should be stricken from the record.

14 **II. USERS OF HJA'S SERVICE MAY NOT HAVE EVEN BEEN PRESENTED WITH** 15 **THE FULL TEXT OF THE AGREEMENT**

16 Plaintiff and Class Members may not have even been presented with the full text of HJA's
 17 Agreement. There appears to be a technical glitch on the part of either eBay or HJA which causes
 18 HJA's Agreement to sometimes display only about the first eight lines. *See* Agreement as
 19 Incompletely Displayed on eBay's Website ("Exhibit B"). This happens periodically and without
 20 any clear pattern. The screenshot in Exhibit B was observed on the afternoon of November 16,
 21 2007. This truncated version of the Agreement contains only about 8.3%¹ of the full text of the
 22 Agreement, leaving out not only all of HJA's liability waivers, but also the arbitration provision
 23 which HJA is now trying to assert as a defense. As Plaintiff and Class Members might not have
 24 even seen over 90% of the Agreement, Walters Exhibit A should be stricken from the record as
 25 an inauthentic version of what was actually agreed to between HJA and Plaintiff and the Class
 26 Members.

27
 28 ¹ This percentage was determined by the number of lines viewable at one time—13 out of 168
 total lines.

CONCLUSION

Walters Exhibit A is an inauthentic version of the Agreement between the parties in this action. It should be stricken from the record and replaced with an accurate version of the contract agreed to by the Plaintiff and members of the Class.

Dated: San Francisco, California
December 6, 2007

Respectfully submitted,

/s/ Matthew A. Siroka
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Exhibit A

To participate in this auction, please review eBay Live Auctions' terms and conditions (one-time process) and the auction house's terms and conditions of sale.

Live Auction terms and conditions (one-time process)

THE FOLLOWING DESCRIBES THE TERMS ON WHICH EBAY OFFERS YOU ACCESS TO LIVE AUCTIONS CONDUCTED BY PARTICIPATING AUCTION HOUSES AND LICENSED AUCTIONEERS (AHS).

Welcome to eBay Inc.'s Live Auction User Agreement (the "Agreement"). This Agreement supplements and is made part of the eBay User Agreement that you have already agreed to, and contains additional and different terms and conditions applicable to your usage of the live auction services we host and participation in live auction events conducted by the AHS. The eBay User Agreement is incorporated herein by reference, and in the event of any conflict between the terms of this Agreement and the eBay User Agreement, this Agreement shall govern.

We may amend this Agreement at any time by posting the amended terms on our site. Except as stated below, all amended terms shall automatically be effective on a prospective basis once they are posted on our site. This Agreement may not be otherwise amended except in a writing signed by you and eBay Inc.

1. **Eligibility.** Each AH that conducts a live auction will have its own eligibility requirements that must be met in order for you to participate in that auction. You may be required to apply for and obtain approval in order to participate in a specific live auction. Approval to participate in one live auction does not guarantee approval to participate in any other live auction, conducted either by that AH, or another AH. Each AH has sole discretion to refuse to approve your eligibility for any live auction.

Terms and conditions of sale for this auction

Terms and Conditions established by Jewelry Overstock Auctions (JOA) for all auctions. CONDITIONS OF SALE Participating and or bidding in this auction means that you acknowledge that you (Buyer) are in complete agreement with all Terms and Conditions of this auction sale as described herein. The following Terms and Conditions of Sale constitute Jewelry Overstock Auctions and the Consignor's (if applicable) full and complete agreement with the Buyer relative to the property listed in this auction. All contents of this auction can be amended exclusively by JOA either by the posting of notices or by Trial announcements made during the sale. The property will be offered by JOA unless it is indicated otherwise. As a prerequisite to participating in this auction, you acknowledge that you are bound by these terms and conditions including but not limited to the following: BUYERS PREMIUM All items are subject to a 15% Buyer's Premium. The Buyer's Premium is a fee traditionally charged by auction houses on the sale of fine goods. It is added to the winning bid price and is paid by the buyer as part of the total sale price. More specifically, auctioneers collect a premium to pay for their services (e.g. hosting a live auction event, advertising, authenticity guarantees, storage, and handling of merchandise). PAYMENT METHODS All payments must be made through PayPal. All major credit cards and e-checks are accepted through PayPal only. We are sorry but no personal checks, money orders or cashiers checks are accepted. When you are ready, click on the "Check Out Now" button located in the item's description so we may process your order. You must make sure that your current e-mail address is the same e-mail address that is registered in your "My eBay Preferences/Personal Information Page" to ensure proper communication. If you have Filters/Spam blockers, you may not receive communications from us and we may not be able to process your order. NON-PAYING BIDDERS JOA must receive payment within 7 days of the end of auction. If payment is not received within the 7 days, you will be in default and your right to the item(s) will automatically be forfeited. JOA will then file a Non-paying Bidder Alert to eBay (which will result in you being suspended indefinitely from eBay) if we do not receive payment by the eighth day after the end of the auction. You must notify us of any special circumstances that would delay you from meeting our payment policy requirements. SALES TAX Unless exempted by law, the Buyer is required to pay California State Sales Tax of 8.25% (if located within

☐ I have read the eBay Live Auctions' terms and conditions and the auction house's terms and conditions of sale above and accept them. **(required)**

☒ Send me a reminder email about this auction.

Exhibit B

to participate in in this auction, please review eBay Live Auctions' terms and conditions (one-time process) and the auction house's terms and conditions of sale.

Live Auction terms and conditions (one-time process)

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Welcome to eBay Inc.'s Live Auction User Agreement (the "Agreement"). This Agreement supplements and is made part of the eBay User Agreement that you have already agreed to, and contains additional and different terms and conditions applicable to your usage of the live auction services we host and participation in live auction events conducted by the AHS. The eBay User Agreement is incorporated herein by reference, and in the event of any conflict between the terms of this Agreement and the eBay User Agreement, this Agreement shall govern.

We may amend this Agreement at any time by posting the amended terms on our site. Except as stated below, all amended terms shall automatically be effective on a prospective basis once they are posted on our site. This Agreement may not be otherwise amended except in a writing signed by you and eBay Inc.

1. Eligibility. Each AH that conducts a live auction will have its own eligibility requirements that must be met in order for you to participate in that auction. You may be required to apply for and obtain approval in order to participate in a specific live auction. Approval to participate in one live auction does not guarantee approval to participate in any other live auction, conducted either by that AH, or another AH. Each AH has sole discretion to refuse to approve your eligibility for any live auction.

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I have read the eBay Live Auctions' terms and conditions and the auction house's terms and conditions of sale above and accept them. **(required)**

☒ Send me a reminder email about this auction.